***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLEE

Original with affidavit of mailing

# 76-1234

To be argued by
PETER R. SCHLAM

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 76-1234**

B P/S

UNITED STATES OF AMERICA,
*Appellee,*

*—against—*

FRANCOIS ROSSI,
*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR THE APPELLEE


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### Preliminary Statement

Francois Rossi appeals from a judgment of conviction entered in the United States District Court for the Eastern District of New York (Jacob Mishler, *C.J.*) on May 12, 1976, after a jury found him guilty as charged in a one-count indictment of conspiracy to traffic in heroin between 1965 and 1973, in violation of Title 21, United States Code, Section 174. Appellant was sentenced to a twenty year term of imprisonment and a $20,000 fine. He is currently serving his sentence.

Appellant does not contest the sufficiency of the evidence against him. His four points relate to his extradition (Point I); alleged prosecutorial misconduct (Point II); and two of the trial court's evidentiary rulings (Points III and IV).

## Statement of Facts

The evidence proved that between 1965 and 1971 appellant was the leader of a major heroin-smuggling network that succeeded in importing into the United States no less than 493 kilograms of heroin. Appellant's organization obtained the heroin in France, and, during the six-year period of its operation, organized seventeen separate smuggling trips, all but one of which succeeed in introducing into the United States substantial quantities of heroin.

The conspiracy began in mid-1965 when appellant met Michel Nicoli and Francois Chiappe in Buenos Aires, Argentina (74-75). The three became partners in the heroin business and remained so until the beginning of 1968. Thereafter, from February 1968 until the beginning of 1971, appellant and Nicoli continued their narcotics partnership without Chiappe.

The *modus operandi* of the conspiracy was to obtain heroin from France and, utilizing different methods of smuggling, to import and sell the heroin in New York. The proceeds of the sales then would be transported to Buenos Aires and divided among appellant, Chiappe and Nicoli. The importation was accomplished in the beginning of the conspiracy by means of "body carries" by appellant, Nicoli and Chiappe. The three conspirators always would use false passports when travelling here. Later on, in 1967, the conspirators began to employ couriers to bring the heroin into the United States.

The first trip occurred in July 1965 when appellant "body carried" two kilograms of heroin into the United States. The heroin had previously been smuggled to Argentina from France by Nicoli (69-95).

The second importation occurred on November 17, 1965 when appellant and Nicoli sold five kilograms of heroin in New York. The heroin had been taped to their bodies when they entered the United States from Argentina (95-103).

In late 1965 the conspirators planned a third trip involving seven kilograms of heroin. Nicoli went to France and returned to Buenos Aires with two of the seven kilos. A French seaman was to bring the remaining five kilos to Buenos Aires concealed on his ship. On February 22, 1966, however, the seaman was arrested in Le Havre, France and the five kilograms were seized after the French police discovered them concealed in the seaman's broom closet. When the conspirators learned of the arrest and seizure, appellant smuggled and sold in New York the two kilos that Nicoli had already brought into Argentina (103-110, 558-575).

A fourth trip was made between November 1966 and January 1967 involving four kilograms of heroin. During this time Nicoli was in jail in Buenos Aires, and, after his release, appellant and Chiappe told Nicoli that they had "body carried" and sold the heroin in New York. Despite his incarceration during this trip, Nicoli nevertheless received his share of the proceeds (110-112).

In February 1967 a fifth importation was made. Nine kilograms of heroin were "body carried" by appellant, Nicoli and a friend of theirs, Giovanni Parisio. The three received the heroin in Spain and flew with it to Canada. In Canada they switched to a train, went to New York where they sold the heroin and returned to Argentina with the proceeds (112-118).

In the Spring of 1967 the conspirators planned a sixth trip. They had met an Avianca Airlines steward,

Lelio Paulo Gigante, a Brazilian, and arranged to have him smuggle five kilograms of heroin from France to New York aboard his airplane. On June 2, 1967 Nicoli received the heroin from Gigante in New York, sold it and returned to Argentina a few days later with the proceeds. The money was divided among appellant, Nicoli and Chiappe (160-186; 587-589).

At the end of June 1967 appellant, Nicoli and Chiappe had arranged another trip with Gigante, this time involving fourteen kilograms. Problems developed, however, when Gigante was arrested with the fourteen kilograms in Columbia, South America after he had received the heroin in France but before he could deliver it in New York. After learning of the arrest and seizure in Columbia, the conspirators commissioned one Miguel Russo, through whom they had met Gigante, to go to Colombia and attempt to salvage the seized heroin. Russo succeeded by paying a bribe to the Columbian police, and, in August 1967, delivered thirteen of the fourteen kilograms to appellant and Nicoli in New York. The heroin was sold here, and the proceeds were transported to Argentina by appellant and Nicoli (187-210).

In October 1967, an eighth trip succeeded in importing nine kilograms of heroin into the United States. Appellant, Nicoli and Chiappe agreed to allow Russo and couriers recruited by him to transport the heroin from France to the United States. Russo delivered the narcotics to Nicoli in New York, and after selling the heroin here, Nicoli returned to Buenos Aires where the proceeds were again divided among appellant, Nicoli and Chiappe (210-221).

In December 1967 a ninth trip, this time involving twenty-three kilograms, was attempted. Russo and his couriers again were to smuggle the heroin here. How-

ever, on December 13, 1967 the couriers, including Russo's brother Carmine Russo, were arrested in Montreal and the heroin was seized there. Russo later told the conspirators that he had instructed the couriers to go from France to Montreal and from there by train to New York where he, Miguel Russo, was to have met them (221-224; 627-642).

In February 1968 the tenth trip, and the last one involving Chiappe, was made. The conspirators had three kilograms of heroin in Argentina. The heroin was transported to the United States by a pilot whose business was transporting meat from Argentina to Miami. The heroin was sold in New York by Nicoli who again returned to Buenos Aires with the proceeds. Once again, the money was divided among appellant, Nicoli and Chiappe (224-227, 230-237).

After Nicoli returned to Buenos Aires in February 1968, appellant explained to Nicoli that he had recently been to Italy where he had spoken to Paul Paganacci, a friend of his from Corsica. Appellant told Nicoli that Paganacci was a most important figure in the narcotics traffic and that Paganacci had told appellant that if appellant had a buyer in the United States, Paganacci could arrange the delivery of forty kilograms of heroin from France to San Antonio, Texas. Appellant told Nicoli that the smuggling of the heroin into the United States would be Paganacci's responsibility. The price would be $7,000 per kilogram delivered in San Antonio. Appellant told Nicoli that he had agreed to the proposition and that Paganacci had given him the telephone number of the person in San Antonio who would have the forty kilograms. At the same time, it was decided that Chiappe would no longer be associated with them (238-240).

In order to receive the forty kilograms, Nicoli and appellant decided to come to the United States, go to San Antonio to receive the heroin and return with it to New York (240-241). As a result, on March 19, 1968, appellant arrived in New York. Two days later, on March 21, Nicoli arrived but he was arrested at John F. Kennedy Intrenational Airport for possessing false documents. When appellant learned of Nicoli's arrest, he arranged for the posting of the $50,000 bail. Nicoli jumped the bail in mid-April 1968 and returned to Buenos Aires (245-253).

In Buenos Aires appellant told Nicoli that while Nicoli had been incarcerated in New York appellant had gone to San Antonio and learned that the forty kilograms had not yet arrived. Appellant also told Nicoli that it would be necessary to find trusted substitutes for appellant and Nicoli to receive and sell the heroin when it did arrive in the United States. Appellant and Nicoli recruited the substitutes, and in September 1968, the forty kilograms were received and sold in New York. The proceeds were transported to appellant and Nicoli in Buenos Aires (238-265).

In November 1968 appellant arranged with Paganacci for the delivery of eighty kilograms of heroin to San Antonio. Again, appellant and Nicoli used trusted agents to receive and sell the heroin in New York. The proceeds were again returned to them in Argentina (265-277).

In the Spring of 1969 appellant told Nicoli that a forty kilogram shipment would arrive in Buenos Aires from France. Appellant then arranged for the transportation of the heroin to New York where it was sold (280-287, 290-291).

In the Summer of 1969, appellant arranged with Paganacci for the shipment of one hundred kilograms of heroin from France to Texas. Agents of appellant and Nicoli received it in San Antonio and transported it to New York where it was sold. The New York buyer, Luis Stepenberg, claimed that thirty of the one hundred kilograms were bad and he destroyed those thirty kilograms. Although Paganacci and appellant, after analyzing a sample of the thirty kilograms, agreed that the thirty kilograms were adulterated, Stepenberg was required to pay them for the thirty kilograms because appellant and Paganacci said he should have returned rather than destroyed them (287-299).

After the one hundred kilogram trip, in late 1969, appellant told Nicoli that he had decided that they would no longer be partners but rather that appellant would give Nicoli the opportunity to buy a portion of each shipment that appellant organized. Appellant told Nicoli that he would be required to pay in advance for each kilogram Nicoli ordered and that a sixty kilogram trip had been planned. Nicoli ordered ten kilograms and paid appellant for them. The trip to New York was successfully completed and appellant paid Nicoli his share of the profits (316-322).

Thereafter, in the Summer of 1970, Nicoli purchased five kilograms from another sixty kilogram shipment that appellant managed (322-335). Finally, in the beginning of 1971, Nicoli purchased seven kilograms from a third sixty kilogram shipment owned by appellant (335-339).

# ARGUMENT

## POINT I

### Appellant was tried on the indictment for which he was extradited.

Appellant claims that the District Court lacked jurisdiction because he was tried on an indictment different from the indictment for which he was extradited to the United States by Spain. The background of appellant's extradition is as follows:

Appellant was first indicted on October 16, 1972 as John Doe, a/k/a "Marcello" in indictment 72 Cr. 1162. The indictment charged appellant, Nicoli and two others with conspiracy to traffic in narcotics between January 1969 and September 1972. On the same day a warrant was issued for appellant's arrest based upon indictment 72 Cr. 1162.

On February 9, 1973, appellant was arrested in Barcelona, Spain. On February 13, 1973, the United States requested the provisional arrest of appellant pending a formal request for his extradition. The American cable requesting appellant's provisional arrest set forth the dates of the conspiracy alleged in indictment 72 Cr. 1162. Inasmuch as indictment 72 Cr. 1162 was the only charge pending against appellant as of February 9, 1973, his provisional arrest could only have been requested based upon that indictment.

On February 15, 1973, indictment 73 Cr. 164 was returned. This indictment named appellant by name (i.e. Francois Rossi, a/k/a Marcello) together with eight co-defendants. Nicoli was named as an unindicted co-

conspirator. The defendants were charged with conspiracy to traffic in narcotics between 1965 and the date of the filing of the indictment, February 15, 1973. On April 13, 1973 the United States made its only request to Spain for appellant's extradition. The request was based on solely on indictment 73 Cr. 164, a copy of which was attached to and transmitted to Spain as part of the extradition request. No extradition request was ever made for anyone based upon indictment 72 Cr. 1162.

On June 8, 1973, the Territorial Court of Barcelona granted the United States' "request for the extradition of the French citizen Francois Rossi, also known as Marcello . . ." While the Spanish court was ruling on the request by the United States for appellant's extradition based upon indictment 73 Cr. 164, the Court mistakenly referred to the dates of the conspiracy contained in indictment 72 Cr. 1162—for which there was no request for appellant's extradition

Appellant argues that since the Spanish extradition order lists the dates of the conspiracy as running "from January 1969 to September 1972", and those dates conform to the period of the conspiracy charged in 72 Cr. 1162, appellant was improperly tried on 73 Cr. 164 and should have been tried on 72 Cr. 1162

At the outset, it is important to note that the Spanish extradition order does not specify that appellant be tried on indictment 72 Cr. 1162. The Spanish court speaks of the "present request" for the extradition of appellant. The only request by the United States for appellant's extradition was based on indictment 73 Cr. 164.

Appellant's further argument that Spain may have denied the extradition request of the United States in

favor of a request by France had Spain known that the United States intended to try appellant for the conspiracy charged in 73 Cr. 164 is meritless. First, as previously stated, the extradition request was in fact based on indictment 73 Cr. 164 and, therefore, Spain was well aware of the intentions of the United States regarding the indictment for which appellant was sought to be tried. Second, the conspiracy alleged in 73 Cr. 164 extends to February 1973 whereas the conspiracy alleged in 72 Cr. 1162 extends only to September 1972. Therefore, appellant's claim that ". . . one factor in the Spanish decision may well have been the recent dates of the conspiracy alleged in # 72-Cr.-1162 (1969-1972)" ignores the more recent ending of the conspiracy charged in 73 Cr. 164 (February 1973).

In short, appellant has attempted to magnify what is at best a clerical error by the Spanish Court into a ground for reversing his conviction. We submit this claim is frivolous.

## POINT II

### Appellant's trial counsel was not misled in any manner in his cross-examination of Government witness Nicoli.

Without a single reference to the trial transcript, appellant argues that his experienced trial counsel, Albert J. Krieger, was misled in his cross-examination of the Government's key witness, Michel Nicoli. Appellant asserts that the prosecutor failed to bring to Mr. Krieger's attention the fact that Nicoli, in an early debriefing statement, had attributed the activities of a person whom he identified in his trial testimony as Lilio Paolo Gigante to one "Roland" who, it turned out, was fictitious. Thus, so the argument goes, counsel was led down a blind alley

and only discovered the lie concerning "Roland" far into his cross-examination of Nicoli. Quite frankly, we do not understand the argument.

First, we have carefully reviewed the trial transcript and we fail to see how the claim can be made that Mr. Krieger was misled in any way concerning the cross-examination of Nicoli. There is no indication that Mr. Krieger ever considered Nicoli's attribution of narcotics activities to "Roland" as anything but a lie. In fact, the very first time Mr. Krieger touched upon the prior statement of Nicoli concerning "Roland" he established that Nicoli had on his direct testimony attributed the activities of "Roland" to Gigante (422-423). Moreover, Mr. Krieger took full advantage of this aspect of his cross-examination when he told the jury in his summation that Nicoli "attributed criminal activities to fictitious persons and people who were dead. Why would he not attribute criminal activities similarly to people who were alive. What yardstick, what standards of measure do you have to apply to say that Nicoli only lied in the areas in which he has confessed" (866).

More importantly, appellant does not claim, nor can he, that the Government did not fulfill its obligation to provide him with the material required by Title 18, United States Code, Section 3500. As a matter of fact, voluminous materials concerning Nicoli's debriefings, grand jury testimony and other dcouments concerning his relationship to the Government were provided to Mr. Krieger prior to the conclusion of Nicoli's extensive direct examination. Included in the 3500 material were references to the fictitious "Roland" which were contradicted by later statements of Nicoli which were also provided by Mr. Krieger and which contain Nicoli's attribution of "Roland's" activities to Gigante.

## POINT III

**The false documents and cash seized incident to appellant's arrest were properly admitted as relevant evidence of appellant's narcotics activities.**

Appellants argues that Chief Judge Mishler erred in admitting into evidence false documents and testimony about $19,000 in cash seized incident to appellant's arrest in Barcelona, Spain on February 9, 1973. We submit that Judge Mishler acted well within his discretion in admitting this evidence.

The false documents served several relevant purposes. First, they corroborated the testimony of Nicoli that appellant used false documents to further his narcotics business. Second, apart from Nicoli's testimony, the jury could find that Rossi used these false documents as instruments of his narcotics business. *United States* v. *Ravich*, 421 F.2d 1196 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970). Evidence of the cash was also properly admitted as circumstantial evidence of appellant's narcotics enterprise. *United States* v. *Schwartz*, 2d Cir. Slip Op. 3277 (decided April 20, 1976).

The indictment charged that the conspiracy continued up to the date of the filing of the indictment, February 15, 1973. The false documents and cash were seized on February 9, 1973. Therefore, appellant's contention that the seizure was too remote to be relevant is contrary to the facts.

Even if the conspiracy is deemed to have ended in 1971 when Nicoli's association with appellant ended, the evidence is nevertheless relevant and admissible as a similar act. The two-year lapse of time between the end of Nicoli's association with appellant and the seizure of the evidence goes to the weight to be given by the jury

to the evidence and not to its admissibility. *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir.), *cert. denied* — U.S. —, 96 S.Ct. 55 (1975); *United States* v. *Schwartz*, *supra* at 3285.

Moreover, Judge Mishler, without objection by defense counsel, explained to the jury the use they could make of this evidence (704-06).

## POINT IV

### The District Court afforded appellant the widest latitude in attempting to develop a motive by Nicoli to lie based on Nicoli's desire to avoid being returned to Brazil.

Appellant contends that he was deprived of a full opportunity to establish Nicoli's motive to lie based upon Nicoli's fear of being returned by the United States to Brazil.

The facts concerning Nicoli's arrest in Brazil are as follows: On October 4, 1972, Nicoli was arrested in Brazil. He was incarcerated there until November 17, 1972 when he was expelled by Brazil to the United States. During the term of his incarceration in Brazil, Nicoli testified that he was tortured by the Brazilian police. Nicoli also testified that at no time, to his knowledge, were any cases pending against him in Brazil. Chief Judge Mishler permitted appellant to question Nicoli in detail on his possible fear of being returned to the country which expelled him and which had no prosecutions pending against him (438-443; 456-461). In his summation, Mr. Krieger dwelled at length on Nicoli's torture by the Brazilian police (868-873; 875).

Appellant's brief states (p. 18) ". . . that the court refused to allow the defense to establish the vital point

tending to prove the strong motive of the witness for cooperating and perhaps committing perjury—the power of the American agents to return the defendant to the hands of the Brazilians and the horrible but real possibility that the United States agents had utilized the Brazilian police to "prepare" a cooperative witness for them (Tr. 919)."

The only citation that appellant gives to indicate that the trial court made such a ruling is page 919. Page 919 refers to the Court's statement to the jury after Mr. Krieger's summation to the effect that although it had cut off Mr. Krieger's argument concerning American participation in the torture of Nicoli by the Brazilian police (see 873-75), the court was not attacking Mr. Kieger's good faith. In his summation, Mr. Krieger had been arguing by implication that the United States was a participant or had even caused the torture (p. 873). Chief Judge Mishler sustained objection to the argument on the ground that there was no evidence whatsoever to support that argument (p. 873).

Appellant's argument that the District Court refused "to allow the defendant to inquire fully into the possible motive and bias of the witness" (p. 19) is plainly false. Chief Judge Mishler allowed defense counsel to explore fully the question of Nicoli's torture (438-43; 456-61). Appellant does not cite any page of the record to show any ruling adverse to appellant on this issue.

The record does not bear out appellant's claim that there was any "restriction" on appellant's cross-examination of Nicoli. Chief Judge Mishler properly cut off defense counsel's argument (pp. 873-75) premised on alleged but wholly unsupported American participation in the Brazilian torture. Similarly, Chief Judge Mishler's refusal to give a charge based on this unsupported allegation was perfectly correct. In sum, appellant's argument is nowhere supported by the record.

## CONCLUSION

**The judgement of conviction should be affirmed.**

Dated: September 20, 1976

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,*
*Eastern District of New York.*

PETER R. SCHLAM,
*Assistant United States Attorney,*
*Of Counsel.*

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK
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EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 23rd day of September, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Albert J. Krieger, Esq.
745 Fifth Avenue
New York, N. Y. 10022

Sworn to before me this
23rd day of September, 1976

Carolyn N. Johnson
CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
NO. 31-4618298
Qualified in Kings County
Term Expires March 30, 19 77

Lydia Fernandez
LYDIA FERNANDEZ